Walton & Company, Inc. *and* Sheet Metal Workers' International Association, Local Union 19, AFL–CIO. Case 5–CA–27672

July 25, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On May 27, 1999, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed a brief opposing the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

CHAIRMAN HURTGEN, concurring.

I agree that there is no violation under *Wireways, Inc.,* 309 NLRB 245 (1992), or under the "inherently destructive" doctrine. In this latter regard, I note that the "inherently destructive" analysis does not even apply where there has been no showing of discrimination. That is, Section 8(a)(3) has two basic elements: (1) discrimination and (2) a motive to discourage (or encourage) union activity. In *Great Dane*,[1] the first element was clear. The employer had discriminated along Section 7 lines, i.e., between strikers and nonstrikers. The second element gave rise to the Court's discussion of conduct that was "inherently destructive" of employee rights vs. conduct that had a "comparatively slight" impact on employee rights. In the instant case, we do not get beyond the first element. That is, unlike *Great Dane*, there was no showing of discrimination along Section 7 lines. The Respondent drew a line between employees with a high wage history and those without such a history. Union adherents without a high wage history were eligible, and nonunion adherents with such a history were not eligible. Thus, there was no showing of discrimination along Section 7 lines, and the "inherently destructive vs. comparatively slight" analysis of *Great Dane* does not apply.

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The complaint alleges that the Respondent's "wage comparability" hiring policy is inherently destructive of employees' Sec. 7 rights. The judge first found no violation, relying on *Wireways, Inc.,* 309 NLRB 245 (1992), which did not involve the "inherently destructive" theory of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Alternatively, the judge found that the General Counsel had failed to establish that the Respondent's hiring policy constituted discriminatory action under the principles of *Great Dane*. We agree. In adopting the judge's conclusion we rely solely on his finding that the record in this case does not permit us to ascertain the severity of any disparate impact resulting from the application of the Respondent's policy.

In the particular circumstances of this case, Member Liebman joins her colleagues in adopting the judge's dismissal of the complaint. As she has stated in other cases, she believes that the *Wireways* standard may be undermining the enforcement of the Act in the construction industry, and that a reexamination of that precedent is warranted. See *Northside Electrical Contractors,* 331 NLRB 1564 fn. 2 (2000); *Benfield Electric Co.,* 331 NLRB 590 fn. 6 (2000). This would include full consideration of *Great Dane* principles. In this case, however, the General Counsel has provided insufficient evidence, apart from the hiring policy itself, to support such a reevaluation.

Cynthia P. Baker, Esq., for the General Counsel.

John L. Senft, Esq. (Barley, Synder, Senft & Cohen, LLC), of York, Pennsylvania, for the Respondent.

Bruce E. Endy, Esq. (Spear, Wilderman, Borish, Spear & Runckel), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in York, Pennsylvania, on April 12, 1999. The charge was filed April 23, 1998,[1] and the amended complaint (the complaint) was issued September 4. The complaint alleges that Walton & Company, Inc. (Respondent), violated Section 8(a)(1) of the Act by maintaining a hiring policy that is inherently destructive of employees' Section 7 rights. The complaint also alleges that Respondent violated Section 8(a)(3) by refusing to consider for employment and/or failing to hire four applicants for employment. Respondent filed a timely answer that, as amended at the hearing, admits the allegations of the complaint concerning the filing and service of the charge, commerce, jurisdiction, and labor organization status; it denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the business of fabrication and installation of sheet metal products at its facility in York, Pennsylvania, where it annually purchases and receives

[1] *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[1] All dates are in 1998 unless otherwise indicated.

goods valued in excess of $50,000 directly from points outside the State of Pennsylvania. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Sheet Metal Workers' International Association, Local Union 19, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The central issue in this case is the legality of Respondent's practice of refusing to hire applicants with a history of receiving wages higher than the wages that Respondent pays to its employees. As indicated, Respondent is engaged in the fabrication and installation of sheet metal for commercial, industrial, and residential establishments. Its sheet metal division manager is Kenneth Smith. Respondent employs employees in the classifications of helpers, apprentices, mechanics, and supervisors. Respondent pays its sheet metal employees up to $14 to $15 per hour. It also provides those employees with paid vacation, paid sick days, paid holidays, medical insurance, and a 401(k)-retirement program. Unlike some employers in the construction industry, Respondent maintains a stable work force and layoffs are unusual.

The Union represents employees at approximately 200 employers and has about 2400[2] members. The Union contract provides that certain represented employees be paid at the rate of about $20 per hour. There are also a small number of nonunion employers in the geographic area who pay their employees at less than the union rate.

B. Respondent's Hiring Practice

Ken Smith does the hiring for Respondent. His decision of whether or not to hire an applicant is based on work experience, work history, and past history of wages. For at least 10 years Respondent has had a practice of not hiring applicants who have a past history of receiving wages in excess of the wages Respondent pays to its employees. This practice is premised on Respondent's belief that although these applicants might accept employment at a lesser rate, they will depart Respondent's employ when they are again offered a higher rate. As Ken Smith explained it "if you're working for $20 an hour, and you take a job for $14 or $15, and somebody makes an offer to come back to work for $20, I think any person would [sic] with some commonsense would do that."[3]

C. The Refusals to Hire

On February 15 an advertisement placed by Respondent ran in a local newspaper. The advertisement was entitled "Sheet Metal Opportunities" and indicated that Respondent had an immediate need for experienced sheet metal supervisor, mechanics, and helpers. The advertisement also stated that Respondent offers "the challenge of a growth-oriented company combined with competitive wages and benefits."

On February 17 Thomas Plummer responded to the ad by visiting Respondent's facility where he filled out an application for a sheet metal worker position. On his application concerning his employment history Plummer listed employers who had contracts with the Union, although there was nothing explicit on the application to indicate any union ties. Plummer also listed his past salary as $20.10 per hour, which coincided with the Union's contractual rate. Plummer left blank that portion of the application that asked him to list his minimum salary requirement. Respondent was aware that the employers listed by Plummer had union contracts and it concedes that Plummer was qualified for the position, but he was not hired.

Thomas Leese also saw the ad and applied for a position with Respondent on February 19. On his application Reese indicated that he was paid $800 per week at his last employer; that employer had a contractual relationship with the Union. In the space requesting his minimum salary requirement Leese placed a question mark. Respondent concedes that Leese was qualified for the position, but he too was not hired.

Jack Smith applied for an advertised position with Respondent on February 17. Smith indicated on his application that he had been paid $20.13 per hour by his past employers. On the space requesting his minimum salary requirement, Smith indicated $12 to $15 per hour. Smith was admittedly qualified for the position, but he was not hired.

Dean Huebner is employed as an organizer for the Union. Prior to that he worked as a sheet metal mechanic. While employed by the Union, Huebner saw Respondent's ad in the newspaper and applied for a position on February 18. Huebner listed the Union as his current employer where he was earning $20.10 per hour and listed his salary at previous employers as $19.63 per hour. On his application Huebner listed his 4-year apprenticeship program in a joint union and employer apprenticeship program. He listed $14 per hour as his minimum salary requirement. Although Huebner was qualified for the position, he was not hired.[4]

As a result of the ad, Respondent did hire certain individuals. Joseph Dewey was hired on or about February 23 as a sheet metal mechanic. On his application he indicated that he had attended "Sheetmetal Workers Local 100" vocational school in Baltimore, Maryland, and that he had recently moved into the area. Dewey indicated that his minimum salary requirement was $11 per hour and that at his previous employers he had earned $12 per hour. Dewey was hired at the rate of $11 per hour. Ken Smith noticed that Dewey's application revealed his attendance at a union vocational school, but that had no impact on the decision to hire Dewey. Warren Strack filed an application on February 23 and was hired by Respondent as a sheet metal mechanic at the rate of $14 per hour. Strack listed $14/15 per hour as his minimum salary requirement on his application. During his interview Strack advised Ken Smith that he had earned about $14 to $15 per hour at his previous employer. Respondent also hired Rex Daniels for the position of field supervisor. Daniels' previous wage history was $13.75 per hour, and his minimum salary requirement was $16 per

[2] The Union's unopposed motion to correct transcript concerning this number is granted.

[3] These facts are based on the largely uncontested testimony of Smith, who I conclude is a credible witness.

[4] The foregoing facts are based on the uncontested testimony of the four alleged discriminatees and the applications that they completed.

hour. He was hired at the rate of $15.50 per hour. Respondent hired Steven Schumacher as a helper at the rate of $9 per hour, which was his minimum requirement. His prior wage history was $7 per hour. Respondent hired Ricky Water at $12 per hour, which also was his minimum requirement; his past wage history was about $11 per hour. Respondent hired Steve Mack at $13 per hour; this was his minimum requirement. His past wage history was $12.75 per hour. Respondent hired David Miller at $7.50 per hour, his minimum requirement. His recent wage history was $6.75 per hour. All of these hirings are consistent with Respondent's hiring policy described above.

During this period Respondent did hire an individual at a rate lower than his past wage history. Jeffery Martson was hired at the rate of $9 per hour when he had a wage history of earning $34,800 per year. Ken Smith explained that Martson was hired on the personal recommendation of Respondent's field superintendent. Martson's application listed the name of the field superintendent as a friend.

During this same time period Respondent also failed to hire about 50 other applicants. Among those was Rocky Heidlebaugh, who applied on April 28 and sought a minimum salary of $14 per hour. He was not hired because of his prior wage history of $20 per hour. There is no evidence that Heidlebaugh had any union connections. Michael McDonald, who applied on February 19 and indicated that his salary requirement was negotiable, was not hired because he had a wage history in the range of $40,000 to $50,000 per year. There is no evidence that McDonald had any union connections.

Earlier, on February 6, Respondent hired Steve Mack as a sheet metal mechanic; at the time of the hearing Mack was no longer employed by Respondent. Dewey abandoned his job with Respondent about 2 to 3 weeks after he was hired. Strack worked for Respondent for several months before he left. On one occasion Respondent hired an employee who had a wage history of earning over $15 per hour; that the employee also left Respondent's employ.

Ken Smith reviewed all applications, including those described above. When he noticed the past wage history of the four alleged discriminatees, pursuant to Respondent's policy, he did not consider them further for employment.[5]

III. ANALYSIS

The General Counsel argues that Respondent's hiring practice is inherently destructive of the employees' Section 7 rights and that the application of this practice to the four applicants violated Section 8(a)(3). The Union argues that Respondent's reliance on its practice is a pretext for refusing to hire applicants with union work histories.

I turn first to the issue of whether Respondent's hiring practice is inherently destructive of employees' Section 7 rights. In order to properly focus the issue in this case, it is important to highlight what is *not* at issue. First, there is no assertion that Respondent's practice was implemented for an unlawful motive. To the contrary, this has been Respondent's practice for many years and there is no evidence that it was created to respond to a union organizing effort. Next, this case does not involve the disparate or discriminatory application of an otherwise lawful rule.[6] The evidence outlined above shows that Respondent has not applied the rule only to keep out union applicants; it shows that Respondent has uniformly applied the policy and has failed to hire applicants who had no apparent union connections also. Moreover, Respondent has hired applicants with union backgrounds, albeit distant backgrounds, if they otherwise fell within the policy. Finally, this case does not involve a facially discriminatory rule.

In assessing the legality of Respondent's hiring practice of refusing to hire applicants whose recent wage history shows that the applicants had earned more money than Respondent was willing to pay, even though the applicant has indicated a willingness to work for Respondent at the lower rate, I shall first examine whether there are any Board decisions that are dispositive. The starting point in this analysis is *Wireways, Inc.,* 309 NLRB 245 (1992). In that case the employer did not hire applicants who expressed a desire to earn wages higher than those budgeted by the employer for the project or, if the applicant indicated that his or her desired wage was negotiable, had a history of earning wages higher than those offered by the employer. The Board concluded that the employer there met its burden of showing that it would not have hired the alleged discriminatees notwithstanding their union support. Specifically, the Board stated that "Respondent demonstrated that the applicants were not hired because they all had sought, or had previously earned, wages that clearly exceeded the budgeted wages the Respondent was offering [footnote omitted]." Id. at 246. Although the Board in *Wireways* was not faced with a specific allegation that the policy applied by the employer in that case was unlawful, the Board had to have considered the lawfulness of the policy in finding that the employer could rely on it to establish that it had not committed an unfair labor practice. Because I have concluded that the hiring policy of Respondent in this case is very similar to the one in *Wireways,* that case is compelling precedent for dismissal of the allegation.

However, the General Counsel and the Union argue that cases decided since *Wireways* have narrowly limited its holding. In *Clock Electric,* 323 NLRB 1226 (1997), enf. denied in part 162 F.3d 907 (6th Cir. 1998), the employer refused to hire two applicants for employment. As part of its defense, the employer asserted that it had done so because the applicants' wage history suggested that they would want wages far beyond what it could afford to pay them and that if the applicants accepted a wage cut they would leave the job when offered a higher wage. This was despite the fact that the applicants had indicated that the wages they sought were "negotiable" or "open." Judge Miserendino concluded that *Wireways* was distinguishable because there was no evidence that the employer's hiring decisions were made with a view toward staying within

[5] The foregoing facts are based on the credible testimony of Smith and related documents.

[6] I reject the Union's argument made in its brief that Respondent's hiring of Martson shows that Respondent ignored its policy when it desired to do so. This single deviation is explained by Smith's testimony that Martson was recommended for his position by Respondent's supervisor. In any event, an isolated deviation is insufficient to taint an otherwise uniformly applied policy.

budget limitations. He also noted that the evidence did not show that the employer's policy had any connection with the length of time employees remained employed with the employer. Finally, he concluded that the employer's argument in this regard was pretextual. The Board affirmed without comment Judge Miserendino's conclusions.

Clock Electric certainly has some similarities to this case. Here, as in *Clock Electric,* there is no specific, objective evidence that budgetary limitations played a direct role in Respondent's decision not to hire the applicants. However, in this case I conclude this fact is largely irrelevant because the issue here is not whether Respondent was able to pay more money than it was offering the applicants or even whether the applicants would accept the amount that Respondent was willing to pay. Rather, the issue is Respondent's policy of simply not hiring applicants with a high wage history, regardless of its ability to pay more or the willingness of the applicants to work for less. Here, as in *Clock Electric,* there is no objective evidence that the application of Respondent's policy actually resulted in the intended effect of hiring employees who would remain in Respondent's employ for longer periods of time. However, I note that there is no evidence that the policy did not have such effect either. Rather, the evidence shows that some employees hired pursuant to the policy nonetheless left Respondent's employ after a short period of time; it does not show whether Respondent's overall experience in this regard would have been better, worse, or the same if the policy had not been followed. In any event, I conclude that such matters are best left for the business judgement of Respondent and that an unlawful motive cannot be inferred simply because a third party may have made different business decisions. In one important respect *Clock Electric* is different than the instant matter. There the evidence showed an "inconsistent application" of the employer's policy sufficient for Judge Miserendino to conclude that the use of the policy in that case was pretextual. I have concluded that there is no evidence of inconsistent application of the policy by Respondent in this case, nor have I concluded that the application of the policy was pretextual. For these reasons I conclude that *Clock Electric* is not dispositive of the issues raised in this case.

I have also considered *Donald A. Pusey, Inc.,* 327 NLRB 140 (1998). There the Board concluded that the application of a policy similar to the one in the instant case was pretextual because the applicant there expressly promised to remain in Respondent's employ for at least a year. Here, however, there is no evidence of such promises, perhaps in part because Respondent did not interview applicants with high wage histories. In any event, on the facts of this case I regard the presence or absence of any such promises largely irrelevant because an employer may properly discount such promises since employees may be eager to obtain employment at the time and such promises are largely unenforceable. I thus conclude that *Donald A. Pusey* is not dispositive of the issues in this case.

I note with interest that in Member Hurtgen's dissent in *Donald A. Pusey,* he specifically stated that the employer's policy was lawful, citing *Wireways.* The panel majority did not challenge this statement. This brings the analysis back to the matter of the continued validity of *Wireways.* I note that the Board has not expressly overruled that case. I have also concluded above that although the Board has distinguished *Wireways* in certain factual settings, those cases are themselves distinguishable from this case. I therefore find that it is proper to apply *Wireways* in this case. Because that case inferentially upheld the legality of a policy similar to the one applied by Respondent in this case, it follows that the allegation of the complaint that the policy is unlawful must be dismissed.

Notwithstanding my conclusion above, these cases show that the resolution of this issue is not free from doubt. I therefore find it appropriate, in the alternative, to examine general principles on this issue in the event that *Wireways* is not dispositive. Generally speaking, findings of unfair labor practices with regards to the discharge of employees or the failure to hire employees are based on whether an unlawful motive formed a basis for such decisions. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Fluor Daniel, Inc.,* 304 NLRB 970 (1991).

However, in certain circumstances an unfair labor practice may be committed even in the absence of an unlawful motivation. Where an employer's discriminatory action is "inherently destructive" of employees' rights no proof of unlawful motivation is required. Where the employer's discriminatory conduct has a "comparatively slight" effect on statutory rights, proof of antiunion motivation is required. *NLRB v. Great Dane Trailers,* 388 U.S. 26 (1967). In that case the employer paid nonstriking employees vacation pay while refusing to pay those benefits to striking employees. The justification for this conduct was the employer's announcement during the strike that it would pay the vacation pay to employees who reported to work on a specified day. Obviously, the strikers did not report to work on that day; they therefore did not receive the vacation pay. The Supreme Court concluded, "There is little question but that the result of the company's refusal to pay vacation benefits to strikers was discrimination in its simplest form." In an earlier case, *NLRB v. Erie Resistor Corp.,* 373 U.S. 221 (1963), the Supreme Court held that a grant of superseniority to strike replacements and employees who abandoned the strike was conduct that was inherently destructive of employees' rights. The Court noted that such conduct operated to discriminate against striking employees. In *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965), the employer locked out employees for the sole purpose of creating pressure for the union and employees to accept its bargaining position. The Supreme Court held that such conduct was not inherently destructive but rather had only a comparatively slight effect on employees' rights. In *NLRB v. Brown Food Store,* 380 U.S. 278 (1965), the employer was a member of a multiemployer association. In response to a whipsaw strike against another employer of the association the employer locked out its employees and continued operations by hiring temporary replacement employees. The Supreme Court ruled that such conduct had a comparatively slight effect on employees' rights and that the employer's conduct was therefore lawful. In *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983), the employer disciplined union officials more severely than rank-and-file employees for engaging in an unprotected work stoppage. The Supreme Court held that directly penalized employees for being union officials, and that such discriminatory conduct was inher-

ently destructive of that right. In *International Paper Co.,* 319 NLRB 1253 (1995), the Board concluded that an employer's permanent subcontracting of some unit work during a lockout was inherently destructive of employees' Section 7 rights to support the union during contract negotiations.

In this case, the General Counsel's argument fails because he has failed to prove "discrimination" in the sense required by *Great Dane.* Here, under Respondent's hiring policy all union applicants will not be rejected nor will only nonunion applicants be hired. For example, applicants for entry-level positions with union backgrounds in lesser paying fields could be hired and applicants with no union backgrounds but with high wage histories would be rejected. Instead, at most, there might be a disparate impact on union applicants that results from the fact that in this particular geographic area in the construction industry union represented employees are paid at a higher level than nonunion employees. None of the cases described above dealt with an argument based on disparate impact. To the contrary, those cases hold that inherently destructive conduct must be discriminatory conduct directly tied to employees' statutory rights. Even assuming that a case could be made based on the disparate impact of an otherwise lawful rule, the General Counsel makes no specific argument in this regard. He presents no arguments as to how disparate the impact on union applicants must be for the policy to slip into the "inherently destructive" as opposed to the "comparatively slight" classification. And the record in this case does not permit me to ascertain the precise severity of any disparate impact resulting from the application of Respondent's policy. Inasmuch as the General Counsel bears the burden of establishing its case, this failure of proof is fatal. Moreover, as described above applicants with union connections have been hired by Respondent and applicants with no such backgrounds but with high wage histories have been rejected.[7] Even then the disparate application does not flow from discrimination based on employees' rights protected under the Act, such as the right to strike. Instead, the disparate impact flows from that fact that union jobs in this industry and in this geographic area pay at higher rate than nonunion employees are paid.

Even if it were determined that Respondent's hiring policy was discriminatory within the meaning of *Great Dane,* I conclude that such discrimination has a "comparatively slight" impact on employees' Section 7 rights and that Respondent's need to operate its business in accord with its best business judgement outweighs any attenuated impact on Section 7 rights. In other words, under these circumstances, specific proof of antiunion motivation is required, but is lacking, in this case. I conclude that Respondent's policy is not inherently destructive of employees' rights, and that this allegation of the complaint must be dismissed.

I now turn briefly to determine whether Respondent violated the Act by refusing to hire the applicants in this case. I have concluded above that Respondent's refusal to hire the applicants was based on its policy of refusing to hire employees with high wage histories. I have further concluded that such a policy is not unlawful. It follows that the refusal to hire the applicants is likewise not unlawful.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not committed the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

[7] I have considered the arguments made by the General Counsel and the Union in their briefs that Respondent only hired applicants with remote union connections. This argument is beside the point because the facts nonetheless show that Respondent's policy does not automatically exclude union applicants.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.